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DEVISES AND THE RULE IN SHELLEY'S CASE.—In the case from which it takes its name,[1] the rule in Shelley's case appears in the broadest terms, as a rule of law; that where a person by any gift or conveyance takes an estate for life and an estate is limited to his "heirs," "heirs" or "heirs of the body" are words of limitation and not of purchase.[2] The statement of a rule of law in such broad terms would seem to preclude the possibility of defeating its application under the given conditions. When, however, it was found that its operation more often defeated than effected the donor's intention, it became necessary to determine whether its original purpose was to aid the intention or to operate independently of it.

On this question the courts have not been agreed. One line of cases represented by *Doe* v. *Goff*[3] seems to consider the rule as an instrument of, and subservient to, the intention. That such was the original purpose of the rule is not improbable since because of the common law's repugnance to putting the seisin in abeyance, a remainder to the heirs was held void. Consequently the only way to effectuate the gift intended for the heirs was to give the ancestor an inheritance in which case the heirs could take by descent. The prevailing authority in England, however, considers the rule an absolute rule of law which operates independently of any intention of the donor to evade it.[4] The result of the theories advanced by Blackstone J. in *Perrin* v. *Blake*[5] is that the rule should be considered as a necessary feature of the general policy of the law of property, and Hargrave[6] argues that the rule was instituted to prevent the creation of "an amphibious species of inheritance" by annexing to a real descent the qualities of purchase.[7] Whatever theory may account for its appearance in the law, its present status is that of a rule of property inseparably connected with the policy of the common law.

It follows then, that the operation of the rule predicates itself on two pre-existing circumstances, first, a freehold in the ancestor and, second, a remainder to the heirs.[8] Descent and purchase are, therefore, simply conclusions of law following from these premises, and to preclude the operation of the rule the absence of one of these circumstances must be established. When the ancestor has taken a freehold, it follows that in order to avoid the rule it must be shown that such a remainder has not been created: "heirs" has been used otherwise than in its generally accepted legal sense;[9] that the donor has so used it as to designate particular heirs or persons.[10] Moreover, when once used in its legal sense no modification however plainly inconsistent with an inheritance as that the heirs shall take by appoint-

[1]Shelley's Case (1581) 1 Co. 93 b.

[2]Shelley's Case 1 Co. 104.

[3](1809) 11 East 668.

[4]Van Grutten *v.* Foxwell [1897] A. C. 658.

[5](1770) 4 Burr. 2579.

[6]1 Har. Law Tracts 564 *et seq.*

[7]1 Har. Law Tracts 567.

[8]1 Hayes, Conveyances (5th ed.) 542, 543; 1 Har. Law Tracts 570.

[9]2 Jarman, Wills (5th ed.) 332; Jones *v.* Morgan (1783) 1 Bro. C. C. 205; Poole *v.* Poole (1804) 3 B. & P. 620; Jesson *v.* Wright (1820) 2 Bligh 1.

[10]Jordan *v.* Adams (1861) 9 C. B. [N. S.] 483.

ment of the ancestor,[11] or that they shall take as tenants in common[12] or shall share and share alike,[13] can be allowed to overcome the legal effect of the words used. Nor will a direct declaration to the effect that the estate shall not be disposed of for longer than life,[14] or that the donee shall have no power to defeat the donor's intent,[15] or that the estate shall vest for life and no longer,[16] avail to change the quality of the estate. The determination of the meaning of "heirs" is, therefore, entirely independent of the rule and this determination alone directs its operation.[17]

In this sense and this sense only is the grantor's intent effective in conveyances *inter vivos,* and if the rule is a feature of the general policy of the common law of property, the conclusion is irresistible that in the case of wills the rôle of the testator's intention should be equally limited; but such has not always been the attitude of the courts.[18] In a recent Iowa case, *Westcott* v. *Meeker* (1909) 122 N. W. 964, the court forced the distinction and refused to apply the rule though "heirs" was used in its technical sense, on the ground that the whole will showed the testator's intent not to have the rule operate. *Perrin* v. *Blake,* the court's principal authority, scarcely supports the contention. For while Blackstone J. admits that in wills the intent may be important, yet he observes that this intent must not be inconsistent with principles of legal policy and that the real question is not whether the testator intended that his son should have the power of alienation but whether he intended that his heirs should take by descent or by purchase. In seeking for such an intent the courts sought only to determine whether the words "heirs of the body" had been used in their generally accepted legal sense, for from the plain language of the will it was evident that the testator intended to annex to the life estate the quality of inalienability. They were seeking, therefore, not to create an exception to the rule but to exclude its operation. In the case of *Van Grutten* v. *Foxwell,*[4] Lord Macnaghten so interpreting the opinion, observes that the question was whether there was any expression or declaration to control the sense in legal idiom of the words used. When once it is found that the word "heirs" has not been so used as to create an estate of inheritance no violence is done either the rule or the legal policy which it preserves by denying its application, but if so used the rule must from its very nature apply alike to deeds and wills. This was also the view of the early American decisions.[19] It is submitted, therefore, that in observing a distinction in its application to deeds and wills the principal case is supported neither by reason nor authority.

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[11]Doe *de* Cole *v.* Goldsmith (1816) 7 Taunt. 209.

[12]Bennett *v.* Earl of Tankerville (1812) 19 Ves. 170.

[13]Jesson *v.* Wright *supra.*

[14]Perrin *v.* Blake *supra.*

[15]Roe *v.* Bedford (1815) 4 M. & S. 362.

[16]Robinson *v.* Robinson (1756) 1 Burr. 38.

[17]2 Jarman, Wills (5th ed.) 334.

[18]4 Kent Comm. (12th ed.) 21; Westcott *v.* Binford (1898) 104 Ia. 645; Doe *v.* Goff *supra.*

[19]James' Claim (Pa. 1780) 1 Dallas 47; Bishop *v.* Selleck (Conn. 1804) 1 Day 299.